

Student Body Right: Running Over the Amateur Defense

An Honors Thesis (HONR 499)

by

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Abstract

The commercialization of sport has transformed the landscape of college athletics. As a non-profit organization, the National Collegiate Athletic Association (NCAA) regulated competition between colleges and universities on principles like amateurism. But college athletics has boomed into a billion-dollar business while the NCAA clings to outdated policies, which restrict student-athletes from marketing their name, image, and likeness. *O'Bannon v. NCAA*, however, threatens to break the hold that the NCAA has over the rights of student-athletes. A victory in *O'Bannon* puts student-athletes closer to receiving the compensation they deserve. The NCAA's policies are overly restrictive, and more about profit of the NCAA than the wellbeing of its student-athletes. This paper considers the NCAA's arguments against allowing compensation for name, image, and likeness, and analyzes the shortcomings of these assertions.

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O'Bannon v NCAA threatens to alter the landscape of college athletics by allowing student-athletes to receive compensation for the use of their name, image, and likeness. The NCAA vehemently opposes allowing student-athletes to cash in on any of the billion-dollar business that is college athletics. The NCAA uses its amateurism policy as a crutch to deny student-athletes the compensation they deserve. This article will provide a background of the *O'Bannon* litigation and consider the NCAA's defense of its policies, highlighting the inconsistencies in the organization's arguments.

The NCAA and Amateurism

Intercollegiate sports began nearly 150 years ago, when Rutgers and Princeton competed in the first college football game in America. The game's popularity exploded across the country over the following decades. That version of football was a violent game; some players even died. Some colleges hired non-students as ringers to improve the teams. Intercollegiate football was unregulated and full of problems. (*O'Bannon v. NCAA*, 2015)

In 1905, the presidents of sixty-two colleges convened to establish a governing body to create uniform rules and regulations for intercollegiate football (*O'Bannon v. NCAA*, 2015). That organization, the National Collegiate Athletic Association ("NCAA"), has since grown to include more than 1,100 member institutions (*NCAA 101*, 2016). The NCAA describes itself as dedicated to protecting the wellbeing of student-athletes and setting these student-athletes up with the skills necessary to succeed on the athletically, academically, and throughout life (*NCAA 101*, 2016). Schools are divided into three divisions, with Division I institutions having the largest athletic departments. The 350 members that make up Division I provide the most financial aid to student-athletes (*NCAA 101*, 2016), and the industry surrounding these athletics generates billions of dollars annually (Keilman & Hopkins, 2015). In football only, Division I is

subdivided into two groups. The Football Bowl Subdivision (FBS) consists of the top-level football programs that participate in the College Football Playoffs and bowl games, instead of an NCAA-run championship.

One of the earliest reforms enacted by the NCAA was the amateurism rules, which require all student-athletes to be amateurs in order to participate in intercollegiate sports, and that their athletic activities be conducted as an integral part of their educational experience (*O'Bannon v. NCAA*, 2015). In order to do this, the NCAA permits member institutions to provide student-athletes with scholarships for cost of attendance, including tuition, fees, room and board, and textbooks (Solomon, 2015).

In addition to financial aid rules, the NCAA has adopted many rules limiting student-athlete compensation and interaction with professionals. If a student-athlete hires an agent, signs a contract with a professional team, or enters a pro draft, the student-athlete forfeits amateur status and is ineligible to compete in collegiate athletics (*Division I Manual*, 2015). Further, a student-athlete cannot receive any compensation (outside of permitted scholarship) based on athletic performance from boosters, companies seeking endorsements, or anyone seeking to use the athlete's Name, Image, and Likeness ("NIL").

O'Bannon v. NCAA Litigation

Ed O'Bannon, former All-American and National Player of the Year for the UCLA men's basketball team (UCLA Athletic Communications Office, 2015), discovered that he was depicted in a college basketball video game produced by Electronic Arts (EA). In the game, a virtual player physically resembled O'Bannon, playing for UCLA and wearing O'Bannon's jersey number, 31 (*O'Bannon v. NCAA*, 2015). O'Bannon said he never consented to the use of his likeness in the video game, and that he was not compensated for his appearance (*O'Bannon v.*

NCAA, 2015). In 2009, O'Bannon filed a federal suit against the NCAA. *O'Bannon* was consolidated with another case, *Keller v Electronic Arts*, and became a class-action suit only for high-level (Division I/FBS) college football and men's basketball players.

O'Bannon Complaint

In the complaint, O'Bannon argued that the NCAA's amateurism rules were an illegal restraint of trade, under Section 1 of the Sherman Act, because the rules stopped student-athletes from receiving payment for the use of their NIL. Section 1 prohibits "every contract, combination... or conspiracy in restraint of commerce among the several states" (Cotton & Wolohan, 2013, p. 626). O'Bannon argued that the NCAA is in violation of the Sherman Act by fixing the amount that student-athletes could receive for their NIL at zero. Further, O'Bannon said that student-athletes were required to relinquish, in perpetuity, all rights related to the use of NIL.

NCAA Defense

The NCAA, in its defense, argued that the compensation of student-athletes for the use of NIL would violate its amateurism policy, which the NCAA considers a bedrock principle of intercollegiate athletics. Further, the NCAA offered that there are procompetitive purposes for rules that prohibit compensation for NIL, including preserving amateurism in college sports, promoting competitive balance between teams and conferences, integrating academics and athletics, and increasing output in the college market.

Procedural History

The district court ruled in favor of O'Bannon, stating that the NCAA had legitimate means for less-restrictive alternatives to the prohibition. The court ruled that student-athletes should receive scholarship up to the "full cost of attendance" (*O'Bannon v. NCAA*, 2016).

Further, the court found that the NCAA could not prohibit member institutions from holding a portion of their licensing revenues in a trust, which could then be used to pay student-athletes as much as \$5000 after they leave college.

The NCAA appealed the ruling, and the circuit court upheld in part and dismissed in part the district court's ruling. The appellate court upheld the increase in scholarship to full cost of attendance, but struck down the deferred payment for the use of NIL. The district court believed that "the difference between offering student-athletes education-related compensation and offering them cash sums untethered to educational expenses is not minor; it is a quantum leap" (*O'Bannon v. NCAA*, 2015).

Analysis

This "quantum leap," which the court refers to, is one that should be made. High-level collegiate student-athletes should be allowed to receive compensation for the use of their NIL. The student-athletes are the only members of the intercollegiate sports system that do not get paid. It grows increasingly difficult to justify the NCAA's amateurism policy as the FBS football and Division I basketball continue to generate billions of dollars for the NCAA, conferences, member institutions, administrators, coaches, and more. The student-athletes, meanwhile, see none of this revenue outside of their grant-in-aid. It is important to note, as in the *O'Bannon* case, that the scope of this analysis is to Division I/FBS football and men's basketball players.

Non-athlete students

To be fair, student-athletes are not the only ones waiving their image rights. Non-athlete students at most colleges and universities are required to release image rights. Colleges can use photos of a student for commercial purposes without compensating the student. This usage, however, is limited only to university promotions. The college does have the right to use the

NIL, but the college cannot sell or license that student's name, image, and likeness to another organization. If so, any student attending college across the country would lose his or her rights to his or her own likeness. The NCAA, then, should not be allowed to license the use of student-athletes NIL to an outside organization, like EA Sports, without compensation for the student-athlete.

One might argue that such a restriction is justifiable because these student-athletes receive compensation up to the full cost of attendance. However, many non-athlete students also receive scholarships, whether on the basis of academic merit, financial need, or talent in a specific field. If a college student studying acting or dance was paid to be in a professional performance, the university certainly would not punish the student-actor. On the contrary, it is likely that the institution would support and promote the student-actor, even as the collegian received compensation for his or her talents. The student-actor and student-athlete are similar in every way, showcasing their talents in front of a large audience, except that one appears on a stage and the other appears on a court. Even though spectators pay to see both the actor and the athlete, only the actor is getting paid under current NCAA policy. There is no persuasive justification for the disparity.

Mandatory Forfeiture of Rights

While the NCAA stated that the release of NIL was not a requirement to participate in intercollegiate athletics, depositions in the case showed that student-athletes and coaches alike believed that the release was mandatory (*O'Bannon v. NCAA*, 2015). A release that waived student-athletes' right to publicity used to be included in the "student-athlete statement," which is a form used to confirm a student-athletes' eligibility. And while the NCAA has dropped the NIL waiver from the requirements, most Division I/FBS conferences still utilize such waiver at

the conference level (*NCAA 101*, 2016). The Mid-American Conference (“MAC”), which is made up entirely of Division I/FBS schools, uses a mandatory waiver that requires student-athletes to give up rights to their NILs without compensation, in perpetuity, for any purpose that the conference or its member schools see fit. Failure to sign the release precludes a student-athlete from competing in the MAC.

Competitive Balance

Certainly, requiring student-athletes to relinquish all image rights is overly restrictive, and in violation of the Sherman Act. The NCAA maintains the restrictions challenged under *O’Bannon* are required to protect the competitive balance of intercollegiate athletics (Davison, 2015). Both the district and circuit courts rightfully held that blocking student-athletes from marketing their NIL had no effect on competitive balance. High-revenue schools already are able to attract better talent by spending millions on brand new facilities and big-name coaches. The NCAA’s argument wrongfully assumes that there is currently competitive balance in college athletics. The University of Alabama’s dominance in football is a clear illustration of the lack of balance. The Crimson Tide have won four national championships in the last seven years.

Consumer Opinion

The competitive balance that the NCAA defends is what the association claims drives consumer demand for its product (Davison, 2015). In *O’Bannon*, the NCAA cited surveys that found consumers were uncomfortable with the idea of paying student-athletes (*O’Bannon v. NCAA*, 2015). This argument, however, seems to contradict what the NCAA states is its core principle. The NCAA proclaims that its primary focus is to protect the well-being of student-athletes and ensure that sports are conducted as an integral part of the student-athletes’ educational experiences. If the NCAA is focused on people, not profit, why must the

organization make its decisions based on what drives profit? Much of the NCAA's defense of these restrictions is based on its moral principles. And yet, when it comes to choosing between the student-athlete's wellbeing and the promise of bigger profits, the NCAA takes the money every time.

The *O'Bannon* decision notes that the public was also uncomfortable with the idea of the International Olympic Committee ("IOC") allowing professionals to participate (2015). People worried that it would ruin the integrity of the Olympics. The IOC developed a trust system that is very similar to what was proposed by *O'Bannon* and accepted by the district court (Sheetz, 2016). Revenue from Olympic athlete endorsements is held in a trust, which can only be accessed for necessary expenses during competition and withdrawn upon completion (Sheetz, 2016). Despite public anxiety over the decision that the athletes could make some money, people continued to watch at the same rate as before (*O'Bannon v. NCAA*, 2015). Arguably, the change elevated the level of competition by allowing some of the world's best athletes to participate. Therefore, the argument seems unpersuasive that consumers would stop watching college athletics if athletes received competition for NIL.

Conclusion

Despite the fact that top-level student-athletes generate more profit for universities than non-athlete students, colleges place more restrictions on student-athletes than any other group of students. And as universities, administrators, executives and coaches all rake in more and more cash from the billion-dollar industry that is college athletics, student-athletes continue to be barred from receiving the share they deserve. While the *O'Bannon* ruling is definitely a step in a positive direction for student-athletes, the case was a hollow victory. Student-athletes still cannot

earn a fair market value for their own name, image, or likeness, and until they can, the NCAA will continue to come under fire.

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